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EDGAR v. MITE CORPORATION: A PROPOSED ANALYSIS

Gary Bunch*

I. INTRODUCTION

In *MITE Corporation v. Dixon*,¹ the United States Seventh Circuit Court of Appeals held that the Illinois Business Take-Over Act² had been preempted by the Securities Exchange Act of 1934,³ as amended by the Williams Act,⁴ and that the Illinois statute created an unconstitutional burden on interstate commerce. The Supreme Court has noted jurisdiction,⁵ and its decision will have a major impact on the validity of Illinois' statute and the takeover statutes of thirty-six other states.⁶

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1. 633 F.2d 486 (7th Cir. 1980).

2. ILL. ANN. STAT. ch. 121½, §§ 137.51-70 (Smith-Hurd Supp. 1981-1982).

3. 15 U.S.C. §§ 78a-78kk (1976).

4. 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1976).

5. *Edgar v. MITE Corp.*, 101 S. Ct. 2043 (1981). (Oral arguments were heard Nov. 30, 1981. The name change is due to the appointment of Mr. Edgar as Illinois' Secretary of State, replacing Mr. Dixon who was elected United States Senator).

Not at issue in *MITE* is Commission Rule 14d-2(b). Promulgated by the Commission in 1979, Rule 14d-2(b) mandates that a tender offeror, within five days of publicly announcing the material terms of the offer, either make the offer effective by providing certain information to the holders of the subject company's stock, or publicly announce the withdrawal of the offer. The Commission in adopting Rule 14d-2(b) attempted to create a conflict with state takeover statutes. The Commission stated: "[T]he conflict between Rule 14d-2(b) and [state takeover] statutes is so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist." 44 Fed. Reg. 70,329-30 (1979). However, the commission designed Rule 14(d)-2(b) to apply only prospectively. *See id.* at 70,326. Thus, since the underlying events in the *MITE* litigation took place before the effective date of 14(d)-2(b) the rule is not at issue in the case.

6. *See* note 2 *supra*. The other states' statutes are: ALASKA STAT. §§ 45.57.010-.120 (Supp. 1978); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (Supp. 1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1980); CONN. GEN. STAT. §§ 36-456 to -468 (1979); DEL. CODE ANN. tit. 8, § 203 (Supp. 1980); GA. CODE ANN. §§ 22-1901 to -1915 (1977); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (1980); IND. CODE ANN. §§ 23-2-3.1-.05 to -11 (Burns Supp. 1981); IOWA CODE ANN. §§ 502.101-.612 (West Supp. 1981-82); KAN. STAT. ANN. §§ 17-1276 to -1285 (1974); KY. REV. STAT. §§ 292.560-991 (1981); LA. REV. STAT. ANN. §§ 51:1500-:1512 (West Supp. 1981); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (1982); MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1981); MASS. ANN. LAWS ch. 110C, §§ 1-13 (Michie/Law.

This Article will review the court of appeals decision, the legislative history and purpose of the Williams Act, and the constitutional issues presented by the *MITE* case. The author will argue that the Court should uphold part and overturn part of the Illinois statute.

II. THE DEVELOPMENT OF *EDGAR V. MITE CORPORATION*

A. *Facts*

In 1979, *MITE* Corporation and *MITE* Holdings, Inc. (collectively *MITE*) made a tender offer for the shares of Chicago Rivet and Machine Co. (Chicago Rivet), an Illinois corporation which has its principal executive offices in Illinois.⁷ Illinois residents owned approximately forty percent of Chicago Rivet's stock and constituted twenty-seven percent of Chicago Rivet's shareholders.⁸ In an action in the United States District Court for the Northern District of Illinois, *MITE* obtained an order enjoining the Illinois Secretary of State from enforcing the Illinois statute in connection with the proposed tender offer for the shares of Chicago Rivet. *MITE* also obtained a declaratory order that the Illinois statute was invalid under the United States Constitution.⁹ *MITE*, after obtaining those orders, withdrew the tender offer for the shares of Chicago Rivet,¹⁰ and the Illinois Secretary of State appealed to the Seventh Circuit Court of Appeals.

Co-op Supp. 1981); MICH. COMP. LAWS ANN. §§ 451.901-917 (Supp. 1981-1982); MINN. STAT. ANN. §§ 80B.01-.13 (West Supp. 1981); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1981); MO. ANN. STAT. §§ 409.500-565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78.376 to -3778 (1979); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (1979); N.J. STAT. ANN. §§ 49:5-1 to -18 (West Supp. 1981-1982); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1981-1982); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. §§ 1707.041 (Baldwin 1979); OKLA. STAT. ANN. tit. 71, §§ 431-451 (West Supp. 1981-1982); 70 PA. CONS. STAT. ANN. §§ 71-85 (Purdon Supp. 1980-1981); S.C. CODE §§ 35-2-10 to 35-2-130 (Supp. 1980); S.D. COMP. LAWS ANN. §§ 47-32-1 to -47 (Supp. 1981); TENN. CODE ANN. §§ 48-2101 to -2114 (1979); UTAH CODE ANN. §§ 61-4-1 to -11 (Supp. 1981); VA. CODE §§ 13.1-528 to -541 (1978); WIS. STAT. ANN. §§ 552.01-.25 (West Supp. 1981). Although Texas does not have a statute, its Administrative Guidelines may be affected by the decision. Tex. Administrative Guidelines for Minimum Standards in Tender Offers, 065.15.00.100, reprinted in 3 BLUE SKY L. REP. (CCH) ¶ 55,671-682 (1977).

7. *MITE Corp. v. Dixon*, 633 F.2d 486, 488 (7th Cir. 1980).

8. *Id.*

9. *Id.* at 490.

10. *Id.* The court of appeals noted that even though the record did not indicate whether *MITE* intended another tender offer for Chicago Rivet's shares, the civil and criminal liability to which the firms would be exposed if the district court were reversed did not render the issues moot. *Id.*

B. *Opinion of the Seventh Circuit Court of Appeals*

In analyzing the issue of federal preemption, the Seventh Circuit rejected the argument that congressional preemption of all state takeover statutes may be inferred. The court stated that the federal scheme of regulating tender offers is not "so pervasive that an implicit congressional intent to preempt parallel state legislation may fairly be inferred."¹¹ The court reasoned that the "absence of an exclusive federal interest in the field of securities regulation is persuasively demonstrated by the historically coordinate role of state regulation in the field."¹² The court recognized that "the Williams Act may . . . be validly complemented and investor protection furthered by state legislation."¹³ Thus, the court stated, the "crucial inquiry is whether the Illinois Act differs from the Williams Act in such a way that achievement of the congressional objective of investor protection is frustrated."¹⁴

In holding that the Williams Act preempted the Illinois statute, the court of appeals found the "most troublesome portion of the Illinois Act"¹⁵ to be section 7E, which compels the Illinois Secretary of State upon determining that "the takeover offer is inequitable . . . [to] deny the registration of the takeover offer or [to] condition its registration upon certain changes or modifications."¹⁶ The court stated that this provision of the Illinois Act adopted a "benevolent bureaucracy" approach to investor protection, which Congress had rejected.¹⁷ The court noted that "Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice."¹⁸

The court also held unconstitutional the Illinois statute's provisions for a twenty-day waiting period¹⁹ and hearing²⁰ prior to the commencement of a tender offer falling within the ambit of the statute. The court stressed that Congress refused to adopt a proposal which provided for a prenotification period. The court felt that the provi-

11. *Id.* at 491.

12. *Id.* at 491-92 (footnote omitted).

13. *Id.* at 503.

14. *Id.* at 493 (citation omitted).

15. *Id.*

16. *Id.* (quoting ILL. ANN. STAT. ch. 121½, § 137.57E (Smith-Hurd Supp. 1981-1982) (citation omitted)).

17. *Id.* at 494.

18. *Id.*

19. ILL. ANN. STAT. ch. 121½, § 137.54E (Smith-Hurd Supp. 1981-1982).

20. *Id.* § 137.57A.

sions' inherent potential for delaying the tender offer impermissibly enhanced the subject company's chance of successfully resisting the tender offer.²¹

In addition, the court held that the Illinois statute was invalid under the commerce clause of the United States Constitution. While acknowledging that "[p]rotecting resident investors is indisputably a legitimate state objective,"²² the court concluded that "the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative."²³ The court found that the substantial impact of the Illinois statute on interstate commerce outweighed the state's interest in regulating tender offers. The court noted that an order of the Secretary of State prohibiting *MITE'S* tender offer might have blocked over 23 million dollars in interstate commerce.²⁴ The court also held that the Illinois statute's applicability to corporations not organized under the laws of Illinois violated the commerce clause.²⁵

III. OPERATION OF THE ILLINOIS BUSINESS TAKE-OVER ACT

Once the jurisdictional base of the Illinois statute is triggered, the statute prohibits commencement of a tender offer until all the precommencement requirements of the statute have been satisfied. The Illinois statute requires a prospective tender offeror to file a registration statement with the Illinois Secretary of State twenty business days before commencing a tender offer.²⁶ At the end of the twenty days, the registration statement automatically becomes effective unless the Secretary calls a hearing.²⁷

The Secretary of State may call a hearing on a proposed tender offer if a hearing is deemed necessary by the Secretary to protect Illinois shareholders of the subject corporation. A hearing also may be requested by Illinois shareholders owning ten percent of the subject corporation's shares, or by a majority of the subject corporation's outside directors.²⁸ A hearing must be requested within fifteen business days after the filing of the registration statement.²⁹ The Secretary's

21. 633 F.2d at 494-99.

22. *Id.* at 500.

23. *Id.*

24. *See id.* at 502.

25. *Id.* at 501-02.

26. *See* ILL. ANN. STAT. ch. 121½, § 137.54 (Smith-Hurd Supp. 1981-1982).

27. *Id.* § 137.54E.

28. *Id.* § 137.57A.

29. *Id.*

hearing on the proposed tender offer is to commence within ten days of the hearing request,³⁰ and the Secretary's decision is to be issued within fifteen days after the conclusion of the hearing.³¹

The Illinois statute mandates that a tender offer remain open for a minimum of twenty calendar days.³² Shareholders of the subject company may withdraw their tendered shares either during the first seventeen calendar days after the tender offer is made or materially changed, or sixty days after the initial date of the tender offer.³³ The Illinois statute further requires that when a tender offer is for less than all the outstanding shares, the shares must be purchased pro rata, based on the amount of shares tendered by shareholders of the subject company.³⁴

Under the Illinois statute the subject company must also submit any solicitation materials to the Secretary of State.³⁵ The subject company is not allowed to solicit against a tender offer before the tender offer becomes registered except that the subject company can make any communication with its shareholders allowed by the Securities Exchange Act of 1934.³⁶

IV. THE DEVELOPMENT OF TENDER OFFERS AND CONGRESSIONAL RESPONSE—THE WILLIAMS ACT

In the 1960's, tender offers became a popular mechanism for obtaining control of a corporation.³⁷ In conventional tender offers, the offeror typically offers to purchase all or a portion of a company's

30. *Id.* § 137.57C.

31. *Id.* § 137.57D.

32. *Id.* § 137.59B.

33. *Id.* § 137.59C.

34. *Id.* § 137.59D.

35. *Id.* § 137.55.

36. *Id.* § 137.58(1).

37. See *Preface* to E. ARANOW, H. EINHORN, & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* at v (1977) [hereinafter cited as *TENDER OFFERS*]. The following are some other factors which have been suggested as an explanation for the increased use of tender offers for obtaining control of a corporation:

- (1) Increased access to cash resulting from greater corporate liquidity and readily available credit;
- (2) Relatively low price-earnings and cash or quick assets ratios, as well as comparatively low book values;
- (3) Other means of obtaining control of the corporation, such as through proxy contests, require those seeking control to convince shareholders that they are better able to handle the affairs of the company than is the incumbent management, whereas tender offers appeal to shareholders on a strictly monetary basis;
- (4) The increasing respectability of tender offers as a takeover technique, along with greater sophistication and knowledge regarding the use of the tender offer.

E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 65-66 (1973).

shares at a premium price, with the offer to remain open for a limited time. Frequently, the offeror's obligation to purchase is conditioned on the aggregate number of shares tendered. If more shares are tendered than desired, the offeror need not purchase the excess; if less than a certain number are tendered, the offeror need not purchase any. The shareholder responding to the offer, however, generally must relinquish control of the shares he desires to tender until the response of others is determined.³⁸

Tender offers typically do not involve the great irrevocable expenditures associated with proxy fights. A tender offeror need not purchase any shares tendered unless shareholders of the subject company tender sufficient shares to give the tender offeror control over the subject company.³⁹ The tender offeror's initial expenditures are generally limited to advertising fees, financing commitment fees, and legal fees.

In 1968, Congress adopted the Williams Act "in response to the growing use of cash tender offers as a means for achieving corporate takeovers."⁴⁰ The Williams Act filled a vacuum in the federal disclosure scheme in connection with efforts to obtain control of a corporation. Proxy solicitations were governed by the Commission pursuant to section 14(b) of the Securities Exchange Act of 1934.⁴¹ An offer of securities in exchange for shares of a company constituted a sale of securities within the meaning of section (2)(3) of the Securities Act of 1933,⁴² and thus required registration pursuant to the provisions of that Act.⁴³ However, prior to the Williams Act, a tender offeror could avoid the registration and disclosure requirements imposed by the Securities Act of 1933 and the Securities Exchange Act of 1934.⁴⁴ A tender offeror could restrict the time frame in which the offer would be outstanding,

38. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811.

39. 15 U.S.C. § 78n(d) (1976).

40. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977) (footnote omitted).

41. 15 U.S.C. § 78n(b) (1976).

42. *Id.* § 77(b)(3).

43. *Id.* § 77f.

44. The Senate Report explained the need for the Williams Act:

Where one company seeks control of another by means of a stock-for-stock exchange, the offer must be registered under the Securities Act of 1933. The shareholder gets a prospectus setting forth all material facts about the offer. He knows who the purchaser is, and what plans have been made for the company. He is thus placed in a position to make an informed decision whether to hold his stock or to exchange it for the stock of the other company.

.....

demand that the tender of stock be irrevocable, and purchase the first tendered shares if the offer was oversubscribed. These conditions produced panic among the subject company's shareholders, who were afraid that if they did not tender quickly they would not have their shares purchased by the tender offeror. Furthermore, once the shareholders tendered they were locked into the tender offer.⁴⁵

Advocates of the Williams Act expressed the view that tender offers were often used as a means of obtaining control of a corporation by paying a premium for the control block of shares of the corporation for the undisclosed purpose of liquidating the acquired corporation.⁴⁶ Thus, in passing the Williams Act, Congress focused on requiring greater and more accurate disclosure by tender offerors to shareholders of the subject company.⁴⁷

The Williams Act contains four substantive provisions. A shareholder of the subject company who has tendered shares to the tender offeror may withdraw deposited securities within seven days of the tender offer, and if the tender offeror has not purchased the tendered shares, the shareholder may withdraw the tendered shares after sixty days from the time of the tender offer.⁴⁸ The withdrawal provisions provide tendering shareholders an opportunity to accept opposing ten-

The cash tender offer is similar to a proxy contest, and the committee could find no reason to continue the present gap in the Federal securities laws which leaves the cash tender offer exempt from disclosure provisions.

S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967).

45. See note 38 *supra*.

46. Senator Kuchel, a sponsor of the Williams Act, stated:

It can be argued that a cash tender offer is a straightforward business proposition which may be rejected by a stockholder or accepted by him, usually at a price in excess of the market price. But where no information is known about the prospective purchasers or their plans, the shareholder may be ignorantly participating in the rape of the corporation. Control and liquidation are often attempted under the secretive guise of the cash tender offer. If this be the case, the shareholders can be deprived of their rightful participation in the liquidation. Indeed, the stock of a major American corporation can be purchased, and the corporation controlled and liquidated without any knowledge on the part of the shareholders to whom the cash tender offer was addressed.

113 CONG. REC. 9338 (1967).

47. [B]y using a cash tender offer the person seeking control can operate in almost complete secrecy. At present, the law does not even require that [the offeror] disclose his identity, the source of his funds, who his associates are, or what he intends to do if he gains control of the corporation. . . .

This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision.

S. REP. NO. 550, 90th Cong. 1st Sess. 2, 3 (1967).

48. 15 U.S.C. § 78n(d)(5) (1976). Securities and Exchange Commission Rule 14(d)7 adds additional withdrawal rights. Pursuant to the rule, tendering shareholders may withdraw their shares up to fifteen days after commencement of the date of the offer and up to ten business days after the commencement of another bidder's tender offer. 17 C.F.R. § 240.14d-7 (1981).

ders and prevent tender offerors from tying up the shareholders' shares.⁴⁹

If within ten days of the tender offer, more securities are tendered than are to be accepted, the tender offeror must purchase the shares on a pro rata basis based upon the number of shares tendered by each shareholder.⁵⁰ This provision reduces the need for a hurried investment decision by a subject company's shareholders who fear that their shares will not be accepted if not tendered immediately.⁵¹

Frequently the first offering price of a tender offer is not attractive enough to obtain the desired quantity of shares. Thus the tender offeror will make a new offer at a higher price in an effort to obtain the desired number of shares. The Williams Act provides that if the tender offeror raises the offering price before the expiration of the tender offer, the increased price must be paid to all tendering shareholders, including those who tendered before the increase in the offering price.⁵² This provision protects persons who tender early in the tender offering period by requiring that any modification of the initial tender offer, which offers a higher price to persons who have not tendered, to be accompanied by a similar offer to persons who had already tendered.⁵³ The Williams Act also prohibits false or misleading statements and fraudulent acts by any person in connection with a tender offer.⁵⁴

49. Professor Manne has criticized the seven-day withdrawal provision of the Williams Act as increasing the cost of tender offers.

It is hard to imagine a more unsettling kind of arrangement. It will be difficult and costly for offerors to keep their financing commitments intact for this additional week. This provision in effect requires offerors to give a seven-day "put" to all shareholders for no compensation. If the market goes down for *any reason*, these shareholders will be in the strange position of having an option to sell. If it goes up, however, they are not obliged to sell. Clearly this kind of risk assumption, as the normal commercial market for puts indicates, is costly.

Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231, 251 (1967).

50. 15 U.S.C. § 78n(d)(6) (1976).

51. See note 38 *supra*.

52. 15 U.S.C. § 78n(d)(7) (1976). Rule 10(b)-13 also makes it unlawful for the tender offeror, from the time of the public announcement of the tender offer, to purchase or enter into an agreement to purchase any of the subject company's securities of the class sought in the tender offer except pursuant to the tender offer. 17 C.F.R. § 240.10b-13 (1981).

53. This provision has been criticized by Professor Manne who has stated:

It is no proof of an invidious form of price discrimination that identical goods may be acquired at varying prices at different times, and there is no logic known to economic theory or law dictating that individual contracts should not be enforced merely because at a later time the price goes up. . . . The net effect of the bill's provision is simply to raise the cost of acquiring corporate control. . . .

Manne, *supra* note 49, at 248.

54. Section 14(e) of the Securities and Exchange Act provides:

It shall be unlawful for any person to make any untrue statement of a material fact or

The theory of the Williams Act is that public confidence in the integrity of the securities market requires shareholders of the subject company to have the opportunity to make an informed and calculated choice whether to sell or to hold stock when confronted with a tender offer.⁵⁵ To accomplish this, the Williams Act requires full disclosure of the future plans of the tender offeror—information without which an informed investment decision cannot be made.⁵⁶ Within ten days after obtaining beneficial ownership of more than five percent of a corporation's stock, a person must file a schedule 13D with the SEC, any stock exchange on which the subject company's securities are listed, and the subject company.⁵⁷ Schedule 13D requires those persons to disclose information about their identity, background, financing, support, and

omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (1976). The Court, in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), defined materiality in the context of a proxy solicitation under section 14(a) of the 1934 Act as follows:

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Id. (footnote omitted). This definition has been applied in the tender offer area. *Piper v. Christ-Craft Indus., Inc.*, 430 U.S. 1, 50-51 (1977) (Blackmun, J. concurring).

55. The importance of public confidence in the securities market was emphasized in a speech by Manuel F. Cohen, former Chairman, Securities and Exchange Commission, before the Association of the Bar of the City of New York (April 14, 1967), reprinted in *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 203-04 (1967).

In many cases, public investors know little or nothing about the person or company making the offer, what the exact conditions of the offer are, or what it means for the future of their company or their investment. In these circumstances trading is characterized by rumor, by speculation and by fear, characteristics which are hardly conducive to public confidence in the securities market. Over the past thirty-odd years we have all worked hard to foster that confidence, partly by requiring public disclosure of important events that affect a company and its securities. An attempt to acquire a substantial or controlling interest in a company is such an event, whether it is made by means of a stock-for-stock exchange offer, or a cash tender offer, or a private or open-market purchase. Unless public investors have the feeling that they "know what is going on" in one of these situations, they will suspect the worst, and they will lose confidence in the fairness and honesty of the securities markets.

Id.

56. See H.R. Rep. No. 1711, *supra* note 38. The underlying postulate of all securities regulation, that providing the investor with the material information concerning a security or security transaction will enable the investor to make an informed investment decision, has been questioned. See Kripke, *The SEC, The Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151 (1970).

57. 17 C.F.R. § 240.13d-1 (1981).

future plans.⁵⁸ Additionally, at the initiation of a tender offer, the tender offeror must file with the Commission and publish or send to shareholders of the subject company a schedule 14D-1 which requires the disclosure of information such as: (1) material financial disclosures by the tender offeror; (2) any past transactions by the tender offeror with the subject company; (3) any possible antitrust or regulatory problem resulting from the success of the tender offer; and (4) information showing compliance with the margin requirements of section 7 of the Securities Exchange Act of 1934.⁵⁹

V. PREEMPTION ANALYSIS

A. *Securities Exchange Act of 1934*

Preemption is not to be lightly inferred.⁶⁰ When the exercise by a state of its police power is challenged under the supremacy clause of

58. 17 C.F.R. § 240.13d-101 (1981). Unfortunately Schedule 13D disclosures usually conceal more than they reveal about the purchaser's plans with regard to the subject corporation. The following is a typical 13D statement:

The Corporation did not at the time of the purchases described herein and does not presently have any plan to acquire control of the Issuer. The Corporation has in the past analyzed the results of and considered the possibility of acquiring control of the Issuer. The Corporation may consider seeking representation on the Board of Directors of the Issuer in the future. The Corporation may suggest business strategies, which might include acquisitions, dispositions and changes in dividend policy and management, to the Issuer in the future. The Corporation may consider the possibility of acquiring control of the Issuer in the future. The Corporation has not had any discussions with the Issuer with respect to acquisition of control, representation on the Board of Directors or business strategies. Since the Corporation may consider seeking to acquire control of the Issuer or obtain representation on the Board of Directors of the Issuer, or since the Corporation may suggest business strategies to the Issuer, the Corporation's position cannot be considered solely that of a passive investor. However, it should not be assumed that the Corporation will formulate a plan to acquire control of the Issuer or seek representation on the Board of Directors of the Issuer or suggest business strategies to the Issuer. The Corporation has been buying and may continue to buy shares of the Issuer. Subject to the conditions set forth below, the Corporation is presently seeking a significant position in the Issuer which might amount to about 20% of the shares of the Issuer. The Corporation intends to continuously review its position in the Issuer and may, depending on its evaluation of the Issuer's business and prospects and upon future developments (including, but not limited to, the attitude of the Board of Directors and management of the Issuer, general economic conditions and money and stock market conditions), determine to cease buying shares of the Issuer or to increase or decrease its position in the Issuer. The Corporation does not presently intend to make a tender offer for shares of the Issuer or propose to the Issuer a merger or similar transaction. As part of its continuing review of its position in the Issuer, the Corporation may change its present intention and determine to make a tender offer for shares of the Issuer or propose to the Issuer a merger or similar transaction.

Lipton, *Open Market Purchases*, 32 Bus. Law. 1321, 1328-29 (1977).

59. See 17 C.F.R. § 240.14d-100 (1981).

60. The preemption doctrine arises from the supremacy clause of the United States Constitution which states that the United States Constitution and federal law "made in Pursuance thereof . . . shall be the supreme Law of the Land"; . . . U.S. CONST. art. VI, cl. 2.

the United States Constitution the Supreme Court starts its analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."⁶¹

Section 28 of the Securities Exchange Act of 1934 provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."⁶² In *Leroy v. Great Western United Corp.*,⁶³ the Supreme Court rejected the Fifth Circuit Court of Appeals' analysis that section 28 imposes an affirmative duty on states not to enact legislation inconsistent with the Securities Exchange Act. The Court found "nothing in its text or its legislative history to suggest that it imposes any duty on the States. . . ."⁶⁴ The Court declared that section 28 "was plainly intended to protect, rather than limit, state authority."⁶⁵ Moreover, nothing in the Securities Exchange Act of 1934 suggests that section 28 was to apply only retrospectively, and thus not be applicable to the Williams Act and tender offers.⁶⁶

Although Congress may implicitly preempt all state regulation in an area by enacting a comprehensive scheme of legislation regulating the whole field, the Williams Act is not such legislation. The Williams Act is a disclosure statute and is not comparable, for example, to the comprehensive federal regulation of aircraft noise that led the Court in *City of Burbank v. Lockheed Air Terminal*,⁶⁷ to conclude that Congress

61. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

62. 15 U.S.C. § 78bb(a) (1976).

63. 443 U.S. 173 (1979).

64. *Id.* at 182.

65. *Id.* (footnote omitted). In *Great Western*, the Fifth Circuit Court of Appeals affirmed the holding of the United States District Court for the Northern District of Texas that the Idaho takeover statute was unconstitutional. However, the Supreme Court decided the case on procedural grounds by holding that "venue did not lie in the Northern District of Texas." *Id.* at 180. The Court explained that "[t]he merits of Great Western's claims may well depend on a proper interpretation of the State's statute, and federal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere." *Id.* at 186.

66. See 15 U.S.C. §§ 78a-78kk (1976) (originally enacted as Act of June 6, 1934, ch. 404, §§ 1-34, 48 Stat. 881).

67. 411 U.S. 624 (1973). When Congress adopted the Williams Act in 1968, the Commission and Congress did not have enough expertise with tender offers to attempt to devise a comprehensive scheme of regulation. The chairman of the Commission testified "[t]his is a developing area, one that is developing rather rapidly, and our understanding and experience is being enhanced every day and with every new takeover bid." *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 15 (1967) (statement of Ma-

had preempted all state regulation in that area.

Furthermore, in the areas of securities and corporate law, the Supreme Court has restricted federal involvement. In *Santa Fe Industries, Inc. v. Green*,⁶⁸ the Court stated that “[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities.”⁶⁹ Indeed, in *SEC v. National Securities, Inc.*⁷⁰ and *Merrill Lynch, Pierce, Fenner & Smith v. Ware*,⁷¹ the Court approved the dual federal and state regulation of securities.

Ware presented a conflict concerning the enforceability of an arbitration clause in an employment contract, between California law and a New York Stock Exchange Rule promulgated pursuant to the Securities Exchange Act of 1934.⁷² The Court upheld the state’s refusal to enforce a compulsory arbitration clause required under the New York Stock Exchange Rule. Although the Court could have sidestepped the preemption question by holding that the Stock Exchange rule did not constitute federal law for purposes of the supremacy clause, the Court upheld the law under conventional preemption analysis.⁷³ The Court did not “overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties.”⁷⁴ The Court noted that “Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation.”⁷⁵ The Court held “that the proper approach is to reconcile ‘the operation of both statutory schemes with one another rather than holding one completely ousted.’”⁷⁶

B. *The Williams Act*

In *MITE Corporation v. Dixon*, the Seventh Circuit Court of Appeals incorrectly equated differences between the Illinois Take-Over Act and the Williams Act as impermissible conflict. However, the fact

nuel F. Cohen). Congress’ failure to define what constitutes a tender offer further highlights that Congress, in adopting the Williams Act, did not set out a comprehensive regulatory scheme. TENDER OFFERS, *supra* note 37, at 1.

68. 430 U.S. 462 (1977).

69. *Id.* at 479.

70. 393 U.S. 453 (1969).

71. 414 U.S. 117 (1973).

72. *Id.* at 119.

73. *See id.* at 134-40.

74. *Id.* at 127.

75. *Id.* at 137.

76. *Id.* at 127 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

that the Illinois statute may differ from the Williams Act is not dispositive; the issue is whether the Illinois statute is repugnant to the Williams Act.⁷⁷

Opponents of state takeover statutes contend that the purpose of the Williams Act is to maintain a balance of neutrality between the tender offeror and the management of the subject company. Proponents of this view rely principally upon the following statement by Senator Williams:

This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder[s] . . . and . . . it may be necessary if the company is to survive.

I have taken extreme care with this legislation to balance the scales equally to protect . . . corporation[s], management, and shareholders Every effort has been made to avoid tipping the balance of [a] regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.⁷⁸

However, the legislative history of the Williams Act reveals a lack of thoughtful analysis aimed at ensuring neutrality between the tender offeror and the management of the subject corporation. The Supreme Court in *Piper v. Chris-Craft Industries, Inc.*,⁷⁹ held that the sole congressional purpose in enacting the Williams Act was the protection of the subject company's shareholders confronted with a tender offer.⁸⁰ In *Piper*, the defeated initial tender offeror brought a damage action against the subject company and the successful tender offeror. The issue was whether an unsuccessful tender offeror had a private right to recover damages from the subject company under the Williams Act.⁸¹

77. See THE FEDERALIST, No. 32, at 200-01 (A. Hamilton) (New Am. Lib. ed. 1961).

It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favour of the Union, remain with them in full vigour, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.

Id.

78. 113 CONG. REC. 854-55 (1967).

79. 430 U.S. 1 (1977).

80. *Id.* at 35.

81. *Id.* at 4.

The plaintiff set forth that the subject company, its management, and the rival tender offeror had made materially misleading statements, in violation of section 14(e) of the Williams Act, which deprived the plaintiff of the opportunity to compete on a fair basis for control of the subject company. The Court held that the defeated tender offeror had no standing under the Williams Act to bring an action for damages because investor protection was the primary purpose of the Williams Act, and neutrality between the tender offeror and the subject company was only a resulting characteristic of the statutory scheme.⁸² The Court stated "Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go . . . to the purpose of the legislation. . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors."⁸³ The Court declared that shareholders confronted with a tender offer were "the constant focal point of the committee hearings."⁸⁴ Similarly, the Court, in *Rondeau v. Mosinee Paper Corp.*,⁸⁵ stated that: "[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."⁸⁶ The Court's position is supported by the testimony of the chairman of the Commission who stressed that: "the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern."⁸⁷

The Williams Act does not effectively provide shareholders of a subject company an adequate time to make an informed decision about

82. *Id.* at 42-46. In *Piper*, the Court referred the defeated tender offeror to the state's law.

Despite the pervasiveness of federal securities regulation, the Court of Appeals concluded in these cases that Chris-Craft's complaint would give rise to a cause of action under [state] principles of interference with a prospective commercial advantage. Although Congress is, of course, free to create a remedial scheme in favor of contestants in tender offers, we conclude . . . that "it is entirely appropriate in this instance to relegate [the defeated tender offeror] and others in [that] situation to whatever remedy is created by state law."

Id. at 40-41 (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)).

83. *Id.* at 29.

84. *Id.* at 31.

85. 422 U.S. 49 (1975).

86. *Id.* at 58 (footnote omitted).

87. *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 178 (1967).

a tender offer. The Williams Act does not expressly mandate that a tender offer remain open for any length of time. The Williams Act does, however, functionally provide for a minimum seven or ten day offering period depending upon whether the offer is for all or a portion of the shares of the subject corporation.⁸⁸ Ten days is an incredibly short time period in which to make an important business decision such as that involved in a tender offer. When confronted with a tender offer, shareholders of the subject corporation must decide whether to tender their shares of the subject corporation to the tender offeror, sell their shares of the subject corporation outside the tender offer, or retain their shares of the subject corporation. Shareholders who purchased shares of the subject corporation for long term investment may panic and sell their shares due to the lack of time available to digest the information as to the future policies of the subject corporation. Furthermore, the congressional time schedule is such that potential competitors often do not have time to make a competing offer.

The Securities and Exchange Commission has acknowledged that shareholders confronted with a tender offer need more time to make an informed investment decision. In discussing its proposed rules of February 5, 1979, which would have required any tender offer to remain open for at least thirty days from the date of its first publication, the Commission noted:

[C]ertain tender offer practices have developed which increase the likelihood of hasty decision making by security holders confronted with a tender offer Tender offers of an excessively short duration increase the likelihood for hasty, ill-considered decision making and the possibility for fraudulent, deceptive or manipulative acts or practices by a bidder and others.⁸⁹

The court of appeals in *MITE Corp. v. Dixon*, stated that:

In the absence of such evidence [of the actual effect of the potential for delay], we ought not to second-guess Congress' judgment that delay grossly in excess of that contemplated by the Williams Act redounds to the detriment of stockholders

88. See 15 U.S.C. § 78n(d)(5)-(6) (1976). Rule 14e-1, however, provides a longer minimum tender offer period. The rule states that any tender offer for non-exempt securities must be held open for at least 20 business days from the date of commencement and if the offered consideration is increased, the offer must remain open for at least 10 business days from the date notice of such increase is first published, sent, or given to security holders. 17 C.F.R. § 240.14e-1(a)-(b) (1981).

89. 44 Fed. Reg. 9956, 9975 (1979).

by substantially deterring the making of tender offers.⁹⁰

The empirical evidence, however, does not support the claim that delay deters tender offers. The number of tender offers has not decreased as a result of states adopting takeover statutes.⁹¹

Nor does the empirical evidence support the contention that delay allows management of the subject corporation to perpetuate itself in office. The management of a subject company in an effort to defeat tender offers has several options available. Those options include charter revisions, repurchase by the subject company of its shares, defensive mergers, the acquisition of a company which creates a potential anti-trust or regulatory problem if the tender offer is successful, the purchase by the subject company, at a premium, of its stock from the tender offeror, triggering friendly tender offers, issuance of treasury shares to investors who will not tender, long term employment contracts, entering into restrictive loan agreements, and initiating legal action against the tender offeror.⁹² Once a tender offer is made, however, the subject corporation is generally taken over by someone.⁹³ There-

90. 633 F.2d 486, 498 (7th Cir. 1980).

91. In 1970 three states had takeover statutes and thirty-four tender offers were made. In 1976 the number of states having takeover statutes had increased to twenty-three and the number of tender offers increased to one hundred seven. In 1978 thirty-three states had takeover statutes and the number of tender offers increased to three hundred twenty-five. See Appleton, *The Proposed SEC Tender Offer Rules—The Proposed Requirements*, 32 BUS. LAW. 1381, 1381 (1977); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 101 n.1 (1979).

92. See A. FLEISCHER, *TENDER OFFERS: DEFENSES, RESPONSES AND PLANNING* 113-55 (2d ed. 1981); E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 234-76 (1973); *TENDER OFFERS*, note 37 *supra*, at 193-202.

Delay significantly assists management in litigation arising out of tender offers. See Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433 (1977), which outlines the incredibly fast time table which exists in tender offer litigation:

You are operating in a pressure atmosphere where you have constant surprise. You have very little turnaround time. The company goes running for counsel: help us. You have to commence litigation immediately. You have to get out your deposition notices. You have to get out your discovery notices. You have to make your motions for expedited discovery. You have to set up your teams for taking what could be two or three sets of simultaneous depositions, often in different cities. You have to be prepared to flow all the information you're getting from depositions and documents into affidavits and briefs almost simultaneously with the taking of the depositions and the review of the documents. You have to be scheduling your applications for temporary restraining orders, stays, preliminary injunctions and the like. You are essentially compressing into a span of four, five or six days what would normally be months and months, if not years, of typical big case litigation, including analysis of antitrust ramifications, industry studies, competitive lines of product and the like. It is unique.

Id. at 1433.

93. Chatlos, *The SEC vs. Investors on Tender Offers*, HARV. BUS. REV., Sept.-Oct., 1978, at 6: The SEC's obsession with entrenched management proved to be an argument made of stale pudding. A study of the death rate of target companies in the years prior to the passage of the Williams Act revealed a mortality rate of 75% in tender offers.

Under the SEC's jurisdiction since then, the rate has risen to 85%. One must won-

fore, delay often benefits shareholders of the subject company by fostering an auction market for the subject company's stock. Potential bidders need time to analyze the subject company, and the delay provided by the Illinois takeover statute affords potential competitive bidders time to make competing bids. This competition provides a better market for the subject company's shares.⁹⁴

Although in an auction market the initial tender offeror stands a greater chance to lose than in the absence of competitive bidding, this does not make the Illinois statute unconstitutional. The congressional purpose in enacting the Williams Act was not to guarantee the success of the initial tender offer.⁹⁵ Moreover, the fact that the potential of an auction market developing for the shares of the subject corporation may impede some tender offers from being made does not make the Illinois statute unconstitutional. Congress in adopting the Williams Act did not attempt to create the legal environment which would foster the greatest number of tender offers. Senator Williams recognized that the Williams Act imposes a cost on tender offerors and may impede some tender offers from being made. Senator Williams stated that although "the bill may discourage tender offers or other attempts to ac-

der whether the end game envisioned here was the benefit of investors or a 100% mortality rate of target companies.

Id.

See Flom, *The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1299, 1299 (1977):

There is a question of [the] utility [of tender offers] under the various state takeover laws. Do they, in effect, destroy the value of the takeover as a corporate tool? I think the answer . . . is no. What the state takeover laws do, by and large, is merely provide for delay. The delay will mean that you are not going to get quite the same bargain you might otherwise have gotten on a short-fuse tender or so-called "Saturday night special." But . . . once you put your offer on the table, . . . the ball is in play and that company will go somewhere. Then it is a bidding match and you have your opportunity to bid. So, to that extent, it still is a very useful tool.

Id.

94. The Georgeson & Co., a prominent proxy solicitation firm, studied contested tender offers. The study found that:

[I]n 20 offers a total premium of \$186 million over the original bids accrued for the benefit of investors as a result of the corporate auction process fostered by the state restraints. On the other hand, during these 26 months only 2 competitive offers were completed in seven days or less, involving a premium of approximately \$7 million. Through June 1978, the accumulative premium to stockholders was well in excess of \$1.1 billion over the original bid, thanks to the state laws.

Chaltos, *supra* note 93, at 7.

A chart dramatically illustrating the benefit inuring to shareholders of a subject company as a result of the auction market is set forth in *The Great Takeover Binge*, BUS. WEEK, Nov. 14, 1977, at 176.

95. The tender offeror does not have "a right under the Williams Act to complete its tender offer successfully." *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1277 (5th Cir. 1978), *rev'd sub nom. LeRoy v. Great Western United Corp.*, 443 U.S. 173 (1979) (improper venue).

quire control by those who are unwilling to expose themselves to the light of disclosure, this is but a small price to pay for adequate investor protection."⁹⁶ Likewise, Chairman Cohen stated that although the "disclosure required by the bills might discourage some tender offers, it is perhaps a small price to pay for an informed choice by shareholders."⁹⁷

The Illinois statute also eliminates the surprise permitted by the Williams Act, which allows the disclosure materials to be filed simultaneously with the commencement of a tender offer.⁹⁸ The original tender offer legislation would have required that a tender offer be preceded by a twenty day advance notice to management of the subject company.⁹⁹ The congressional election not to adopt this advance notice provision does not preclude Illinois from adopting such a provision. Nor does the fact that federal law tolerates certain conduct necessarily mean there is an affirmative federal policy encouraging such conduct. *Exxon Corporation v. Governor of Maryland*,¹⁰⁰ presented the issue of the constitutionality of a Maryland statute that prohibited oil companies from owning gasoline stations and mandated that if refiners gave any allowances to retailers, the allowance must be given to all retailers. Exxon argued that section 2(b) of the Robinson-Patman Act¹⁰¹ did not prohibit oil companies from granting allowances and that Maryland could not regulate allowances. The Court rejected Exxon's argument and held that section 2(b) of the Robinson-Patman Act did not preclude Maryland's right to regulate allowances.¹⁰²

Section 7E of the Illinois statute provides for a fairness review of a tender offer by the Secretary of State.¹⁰³ Congress, by enacting the Williams Act, attempted to ensure that a tender offeror would provide full disclosure of all material information to the shareholders of the subject company. The Williams Act is designed so that the ultimate arbitrators of every tender offer are the shareholders of the subject company. The Act protects those beneficiaries of the statute through a policy of disclosure, by providing them information needed to make an

96. 113 CONG. REC. 24,664 (1967).

97. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149, 151-52 (1966).

98. Compare 15 U.S.C. § 78m (1976) with ILL. ANN. STAT. ch. 121½, § 137.54 (Smith-Hurd Supp. 1981-1982).

99. S. 2731, 89th Cong., 1st Sess., 111 CONG. REC. 28,256, 28,259 (1965).

100. 437 U.S. 117 (1977).

101. 15 U.S.C. § 13b (1976).

102. 437 U.S. at 133-34.

103. ILL. ANN. STAT. ch. 121½, § 137.57E (Smith-Hurd Supp. 1981-1982).

informed investment decision. Section 7E of the Illinois statute, however, does not assist the shareholder in making an informed investment decision; the section gives the Secretary of State power over the tender offer.¹⁰⁴ A free market as envisioned by the Williams Act depends upon individual decision making. In regard to tender offers falling within the ambit of the Illinois statute, section 7E has the potential to eliminate decision making by the market, by giving the Secretary of State authority to preempt a shareholder's right to make any investment decision by refusing to register the tender offer. The presumption that the Secretary of State's decision will be made in good faith does not cure this evil of section 7E.¹⁰⁵ "Thus, to the extent that Illinois has chosen to rely upon its Secretary of State's judgment rather than upon investors' own judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional."¹⁰⁶

The Illinois statute, other than section 7E, does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁰⁷ Compliance with the other provisions of the Illinois statute does not prevent the tender offeror from also complying with the Williams Act. The information required to be disclosed by the Illinois statute is essentially the same information required by the Williams Act. The additional disclosure mandated by the Illinois statute does not impinge on the congressional policy embodied in the Williams Act; the additional disclosure merely gives the investor more information on which to make an informed investment decision. Moreover, Illinois will accept in lieu of the Illinois registration statement, "a registration statement form or other filing required by a federal or state government agency . . . which . . . encompass[es] disclosure requirements substantially equivalent to those contained in . . . this Section."¹⁰⁸ After compliance with the Illinois statute's twenty day prenotification provision, and after a hearing, if one is held, the tender offeror may proceed with the tender offer. Compliance with those sections of the Illinois statute does not prevent the tender offeror from complying with the pro rata, withdrawal, and disclosure require-

104. *Id.*

105. 633 F.2d at 494.

106. *Id.*

107. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

108. ILL. ANN. STAT. ch. 121½, § 137.54-4D (Smith-Hurd Supp. 1981-1982).

ments of the Williams Act.¹⁰⁹

VI. COMMERCE CLAUSE ANALYSIS

In *MITE*, the court of appeals also held that the Illinois statute violated the commerce clause of the United States Constitution. The court stated that "had the Secretary of State not been enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected."¹¹⁰ Under the proper commerce clause¹¹¹ analysis, however, the pivotal inquiry focuses on the benefit versus the cost of compliance with the statute and not the more burdensome impact of noncompliance. For instance, the Supreme Court has upheld the right of a state to establish the minimum size of train crews for trains operating in the state.¹¹² In those cases, the Court focused on the cost incurred by railroads in complying with the additional expense imposed on the railroads by the statutes rather than on the cost of noncompliance with the statutes, which would have resulted in trains lacking sufficient crews not being allowed to operate in the states whose statutes were challenged.

The Illinois statute contains two jurisdictional bases. Tender offers falling within the ambit of the statute are those in which ten percent of the shares of the subject company are held by residents of Illinois or those in which the subject company satisfies two of the following: (a) Has its principal executive offices in Illinois, (b) is organized under the law of Illinois, (c) has at least ten percent of its stated capital and paid in surplus contributed by Illinois residents.¹¹³

109. 15 U.S.C. §§ 78n(d)(6), (5), 78m(d) (1976). The tender offeror must also comply with the provisions of the Illinois statute requiring the tender offer to be held open for a seventeen day period and the Illinois pro rata provision. ILL. ANN. STAT. ch. 121½, §§ 137.59C, 137.59D (Smith-Hurd Supp. 1981-1982).

110. 633 F.2d at 502.

111. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." . . . Adhering to the landmark case *Cooley v. Board of Wardens*, 53 U.S. 143 (12 How. 299) (1851), the Court established that:

[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . .

[T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

112. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R. Isl. & Pac. R.R.*, 393 U.S. 129 (1968); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931).

113. ILL. ANN. STAT. ch. 121½ § 137.52-10 (Smith-Hurd Supp. 1981-1982).

The first jurisdictional base reflects Illinois' legitimate interest in protecting Illinois investors. The second jurisdictional base reflects Illinois' legitimate interest in regulating the internal affairs of corporations having a substantial nexus with Illinois.

The extraterritorial reach of the Illinois statute enables Illinois to control transactions between nonresident tender offerors and nonresident shareholders of the subject company when the jurisdictional base of the statute is satisfied. This extraterritorial effect, however, does not place an undue burden on interstate commerce. The Illinois statute applies equally to Illinois and out of state tender offerors and does not discriminate in favor of Illinois resident shareholders.¹¹⁴ Under the commerce clause, state laws which do not discriminate against out of state goods or residents are governed by the standards enunciated in *Pike v. Bruce Church, Inc.*¹¹⁵ "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹¹⁶ Without the extraterritorial effect of the Illinois statute, Illinois' regulation of tender offers for shares of corporations having a substantial nexus with Illinois would be ineffective. The tender offeror would attempt to purchase the securities needed to gain control of the subject corporation from the corporation's shareholders located in other states.

Moreover, the extraterritorial reach of state corporation law is normal. A shareholder's relationship with the corporation and other shareholders is governed by the law of the state under whose law the corporation exists.¹¹⁷

The commerce clause does not prohibit the state of incorporation from regulating the internal affairs of corporations incorporated in the state. "[T]he act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation."¹¹⁸ In

114. *See id.*

115. 397 U.S. 137 (1970).

116. *Id.* at 142.

117. For instance, any shareholder of a Delaware corporation, no matter what the shareholder's state of residence, is limited and protected by various sections of Delaware corporate law. *E.g.*, DEL. CODE ANN. tit. 8, §§ 173, 262 (1974 & Supp. 1980).

118. *Broderick v. Rosner*, 294 U.S. 629, 643-44 (1935) (quoting *Modern Woodmen of America v. Mixer*, 267 U.S. 544, 551 (1925)).

Cort v. Ash, the Court noted “[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”¹¹⁹

A tender offer involves an internal affairs matter of the subject corporation as it impacts upon “the relationships *inter sese* of the corporation, its directors, officers, and stockholders”¹²⁰ and thus Illinois may regulate the tender offer. A successful tender offer results in a change of corporate control, a process which Illinois has a legitimate interest in regulating. A tender offeror upon completion of a successful tender offer takes control of the subject company and enters into a fiduciary relationship with the subject company and its shareholders. A successful tender offer is generally followed by the subject company having a new board of directors, new management, and a new policy. A shareholder who retains stock in the subject company functionally becomes a shareholder in a new entity. Shareholders who only tender some of their shares, or who have only some of their tendered shares purchased by the tender offeror are in effect choosing new directors. Thus a tender offer is analogous to a proxy solicitation which states traditionally regulate. Indeed, the Senate report on the Williams Act recognized that tender offers are unique transactions and not mere sales of securities between shareholders of the subject companies and third parties.¹²¹

In *MITE*, the court of appeals stated that in regard to corporations not organized under its laws, Illinois “has no interest in regulating [their] internal affairs.”¹²² Although the law of the state of incorporation will generally govern the internal operations of a corporation, a state other than the state of incorporation may have sufficient nexus

119. *Cort v. Ash*, 422 U.S. 66, 84 (1975).

120. Reese and Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124 (1958).

121. S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967):

It has been argued that a cash tender offer is a straightforward business proposition which can be rejected or accepted by a shareholder like any other bid for his securities. But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that the present management and its policies will continue.

The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based.

Id.

122. 633 F.2d at 502.

with a corporation to apply its substantive corporate law. *German-American Coffee Co. v. Diehl*¹²³ presented the issue of the right of a corporation, incorporated in New Jersey, but with its main location of business in New York, to pay dividends allowed by New Jersey corporate law but not by New York corporate law. The New York Court of Appeals applied New York law. In rejecting the argument that the application of New York law would violate the commerce clause, the court stated:

This statute makes no attempt to regulate foreign corporations while they keep within their domicile. It is aimed against them only while they elect to live within our borders. The duty which it imposes arises only when they come to us, and ends the moment that they leave us. Such a statute, however phrased, is, in effect, a condition on which the right to do business within the state depends. . . . If they take the corporation out of the state, they may declare dividends as they please. If they elect to keep it with us, they must not lead it into paths of ruin. In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our Legislature be invested with this measure of control. If the control is irksome, it may be avoided by leaving us. Even if the prohibited act is done in the home state, it may be so bound up in its results with the business in this state that we cannot view it with indifference.¹²⁴

Another analogous example of the application of a state corporation statute to a corporation not incorporated in the state is *Western Air Lines, Inc. v. Sobreski*.¹²⁵ In that case, Western Air Lines, Inc., a Delaware corporation, had a charter that provided for cumulative voting. An amendment of Western's charter eliminating this cumulative voting provision triggered legal action. A Delaware court directed the airline to adhere to the amendment change in electing directors. The California Corporation Commissioner obtained an injunction on the ground that the challenged amendment constituted a sale of a security under the California Securities Act and was inequitable. In order to protect the rights of the California shareholders of Western, the California Commissioner's actions enjoined not only the voting of the California shareholders of the airline, but also shareholders located in other states.

123. 216 N.Y. 57, 109 N.E. 875 (1915).

124. *Id.* at 64, 109 N.E. at 877 (citation omitted).

125. 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

The applicability of the Illinois statute in the *MITE* case is similarly appropriate. Chicago Rivet's principal executive offices are located in Illinois. More importantly, Illinois residents own over forty percent of the shares of Chicago Rivet. Thus Chicago Rivet's substantial nexus with Illinois justifies Illinois regulating the internal affairs of Chicago Rivet.

VII. CONCLUSION

Except for section 7E authorizing the Secretary of State to decide the substantive fairness of tender offers falling within the ambit of the statute and to enjoin those found inequitable, the Illinois Business Take-Over Act is constitutional. In enacting the Williams Act, Congress attempted to insure that a tender offeror would provide full disclosure of all material information to the shareholders of the subject company. The Williams Act contains no language indicating that Congress intended to regulate all aspects of tender offers. Shareholders of a subject company confronted with a tender offer need the additional time provided by the Illinois statute to make a considered informed judgment about what they should do with their shares of the subject company. Furthermore, the Illinois statute does not unduly burden interstate commerce. Illinois has a right to protect investors residing in the state and to regulate the internal affairs of corporations having a substantial nexus with the state. The potential for delay of a tender offer inherent in the Illinois statute does not significantly deter tender offers for companies falling within the jurisdiction of the statute.